IN THE SUPREME COURT OF MISSOURI

Henry G. Lane, William and Margie Anglen, Lloyd Haley, Curtis Braschler, Gordon L. Trumbo, Beulah F. Alverson, Ernest W. Greenup, and Ronald M. Lucas,	)	
Appellants,	)	
v.	)	**NO. SC86116**
	)	**(Oral Argument Requested)**
Patricia S. Lensmeyer, Boone County Collector, and the Columbia 93 School District,	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT
HONORABLE FRANK CONLEY, JUDGE

SUBSTITUTE APPELLANTS' BRIEF

ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.
Craig S. Johnson MO Bar No. 28179
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered after court trial. Plaintiff property taxpayers brought suit against the Boone County Collector, pursuant to §139.031 RSMo, for refund of allegedly excessive property taxes. Plaintiffs contend that the 2001 property tax rate of the Columbia 93 School District was excessive in that the tax rate violated §67.110.2 RSMo by not being calculated to produce substantially the same amount of local property tax revenues as required by the annual budget adopted by the Columbia 93 School District.

Plaintiffs sought individual and class refunds pursuant to §139.031 RSMo for violations of §67.110 RSMo. The Circuit Court refused class certification. After court trial, on September 27, 2002 the Court entered judgment against Plaintiffs, determining that the 2001 property tax rate of the Columbia 93 School District did not violate §67.110 RSMo.

This case involves construction of § 67.110 RSMo. § 67.110 RSMo is one section of Chapter 67 RSMo devoted to miscellaneous powers of political subdivisions of the state of Missouri. § 67.110 RSMo applies to each political subdivision in the state, except counties. The title of § 67.110 RSMo is:

> "Fixing ad valorem property tax rates, procedure—failure to establish, effect—new or increased taxes approved after September 1 not to be included in that year's tax levy, exception."

The primary substantive issue presented here is whether a political subdivision's tax rate that would produce more tax revenues than called for by the budget of that political subdivision violates § 67.110.2 RSMo. Issues are also raised regarding the propriety of the Court's Order joining the School District as party defendant, and the propriety of the Court's Order refusing to certify the class of taxpayers as party plaintiff.

The Supreme Court has exclusive appellate jurisdiction of cases involving the construction of the revenue laws of this state. Article V, Section 3, Missouri Constitution. The Court of Appeals has general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court.

This appeal does involve the construction of a revenue law. However the tax rate/ revenue in question is the rate/revenue of the Columbia 93 School District, not of the state of Missouri. Because the law in question involves tax revenues that are not deposited into the state treasury, this case does not involve the construction of a revenue law "of this state". *Alumax Foils, Inc., v City of St. Louis*, 939 SW2d 907, 910 (Mo banc 1997); *Kuyper v Stone County Commission*, 838 SW2d 436 (Mo banc 1992). As such this appeal does not lie within the exclusive jurisdiction of the Supreme Court, hence jurisdiction is within the general jurisdiction of the Court of Appeals, wherein this appeal was processed.

The Missouri Court of Appeals, Western District, entered a modified Opinion of June 29, 2004. By Order of August 24, 2004, the Supreme Court granted transfer after Opinion. Jurisdiction of this case is now properly before the Supreme Court.

STATEMENT OF FACTS

Note: There were two hearings in this case, an August 2, 2002 class certification hearing, and an August 23, 2002 court trial of the merits. The transcript contains both hearings in a single volume, with the class certification hearing found at T. 1-80, and the court trial found at T. 81-224. Both hearings had numerical exhibits admitted into evidence. Plaintiffs class certification exhibits will be referred to as "Pltf. CC Exh.__", and Plaintiffs' trial exhibits will be referred to as Pltf. Exh.__".

Plaintiffs are property taxpayers paying 2001 property taxes determined in part by the tax rate of the Columbia 93 School District. Defendant Columbia 93 School District set the tax rate in question. In her official capacity, Defendant Boone County Collector Patricia Lensmeyer billed and collected the tax revenues in question. Plaintiffs contended the tax rate was unlawfully excessive in that it would produce local property tax revenues substantially in excess of that budgeted by the School as its local property tax revenue needs, in violation of § 67.110 RSMo. Plaintiffs sought a refund of the amount of taxes contended unlawful pursuant to the statutory remedy provided by § 139.031 RSMo. L.F. 45-56.

The Columbia 93 School District adopted its 2001-2002 School Year Budget on June 11, 2001. That budget called for current 2001 tax year total local property tax revenues of **$56,232,505**. Pltf. Exh. 4, page 71, line item 5111; and Pltf. Exh. 5, line item 5111; A48. See also the testimony of Columbia 93 School District Director of Business Services and Treasurer, Kevan Snell, T. 100, 103, agreeing that this was the local property tax revenue budgeted.

On August 15, 2001, the Columbia 93 School District published a newspaper notice announcing that a public hearing would be held August 23, 2001 on a proposed property tax rate of $4.7544 per $100.00 of assessed valuation for the year 2001. Pltf. Exh. 9, T. 104-105, 107; A49. The notice showed that the $4.7544 local property tax rate times the total assessed valuation of $1,281,852,353 would produce estimated total local property tax revenues of **$60,944,388**.

On August 23, 2001, Columbia 93 School officials executed the School District's Estimate of Required Local Taxes reflecting the same tax rate, the same total assessed valuation, and a total property tax revenue need of $60,944,388. The Estimate of Required Local Taxes was the official document by which the School District notified the Boone County Clerk, and other local taxing authorities, of the tax rate to be collected. Pltf. Exh. 10, T. 105-106; A50.

"Current" revenues are those received by the Boone County Collector through February 28, 2002, the end of the Collector's fiscal year. The Collector's fiscal year runs from March 1 through February 28. Pltf. Exh. 11, T. 83-84. Based on its experience, the School District estimated that 94% of total local property tax revenues would represent "current" tax revenue, that is, revenue received from the time the tax bills were issued until February 28, 2002. The other 6% of the total revenue amount, after true uncollectibles and fees, was expected to be received sometime after February 28. Documents of the Collector referred to revenues received after February 28 as "back" taxes. See Pltf. Exh. 12. The School District documents refer to these revenues as "delinquent" taxes. See Pltf. Exh. 5, A48.

Mathematically, if the School's 2001 tax rate of $4.7544 per $100.00 assessed valuation is taken times the total assessed valuation of the property in the School District, it will produce total local property tax revenues of **$60,944,388**. This is the figure shown by the School District on its Estimate of Required Local Taxes, Pltf. Exh. 10, A50. This same amount is also reflected on the School District's notice of public tax rate hearing. Pltf. Exh. 9, A49. The difference between the budgeted local taxes, and that which the tax rate would mathematically produce, was $4,711,883.

The School's notice of public tax rate hearing, Pltf. Exh. 9 at A49, describes this $4,711,883 difference as "anticipated delinquencies". However, taking the budgeted 6% "delinquent" rate times the $60,944,388 of total revenue produces a delinquency of $3,656,663, not $4,711,883 as set forth in Exhibit 9. In other words taking the tax rate times the assessed valuation times 94% produces $57,287,725, not the budgeted current revenue of $56,232,505.

The "anticipated delinquencies" amount included on Exhibit 9 was actually $1,055,220 more than a six percent delinquency would produce. The School District's Director of Business Services, and School Board appointed Treasurer, Kevan Snell, agreed with those calculations. T.111-112[1]:

[1] "Q. The total revenue figure that would be generated would be $60,944,388?

A. Assuming 100 percent collection, that is correct.

Q. That is the exact figure that shows up on Exhibit Number 10 itself?

A. That's correct.

Defendant Collector mailed 2001 property tax bills to taxpayers and began tax collections in November of 2001. T. 84. The tax bills were based on the tax rate of $4.7544 per $100.00 assessed valuation, as set by the School in its Estimate of Required Local Taxes, Pltf. Exh. 10, A50. See also the Plaintiffs' tax bills found in Pltf. Exh. 17.

On November 6, 2001, counsel for Plaintiff Henry Lane notified the Boone County Collector that Mr. Lane would be challenging the Columbia 93 School District's 2001 tax rate on behalf of all taxpayers. Pltf. CC Exh. 4. This letter indicated Mr. Lane's belief the tax rate was excessive, attempted to preserve the right of all taxpayers to be

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Q. If you only collected 94 percent of that, would you agree with me that 94 percent of $60,944,388 equals $57,287,725?

A. I would agree that you probably have done the math and that is the right number. I don't know exactly. But that's probably correct.

Q. Now I go to the exhibit that shows you budgeted revenue, current tax, it shows, I'm looking at Exhibit Number 5, sir.

A. Yes.

Q. It shows a figure of $56,232,505, is that correct?

A. That's correct.

Q. So would you agree with me that when you take your total tax projection less the six percent that you won't collect or that you anticipate you won't collect, you still are going to generate $1,055,220 more than the $56,232,505 figure as our current tax budget from Exhibit 5?

uniformly taxed pursuant to Section 3 of Article X of the Missouri Constitution by protesting the School District's 2001 tax rate on behalf of all taxpayers, and indicated a suit for refund would be filed on behalf of all taxpayers.

Earlier, Mr. Lane had requested the Boone County Prosecuting Attorney, the Missouri Attorney General, and the Missouri State Auditor to help correct this situation. Pltf. Exhs. 24, 25, and 26.

On November 6, 2001, Mr. Henry Lane instituted suit on behalf of all taxpayers against the Columbia 93 School District. (L.F. 10) In this suit Mr. Lane requested a declaration of the correct tax rate in compliance with § 67.110 RSMo, and injunctive relief to correct the tax bills in time for 2001 tax collections. (See allegations of original Petition, L.F. 15-16) The Columbia 93 School District filed motions to dismiss. (L.F. 17-29) Plaintiff Lane filed corrected suggestions in support of his position on December 27, 2001. (L.F. 30-41). On December 28, 2001, motions were presented to the Boone County Circuit Court. (L.F. 3).

No declaratory or injunctive relief was obtained by the December 31, 2001 deadline for paying property taxes. On January 4, 2002, Plaintiff Henry Lane filed a motion to amend his petition converting the matter from an injunctive action to one for refund on behalf of all taxpayers, adding eight other individual taxpayer plaintiffs as proposed class representatives, adding the Collector as party Defendant, and dropping the Columbia 93 School District as a party Defendant. (L.F. 42-44, 45-56) Leave to file the

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A. Correct."

amended petition, and dismissing the injunctive petition, was ordered on January 14, 2002. (L.F.044).

The nine named Plaintiffs had all paid their taxes under protest. Pltf CC Exh. 1. The written protests of six of them included the following statements:

> "I am paying my taxes under protest. The Columbia 93 School District has imposed a levy rate….which produces more revenues from local property taxes than called for by the School's budget in violation of Section 67.110 RSMo……I also request that this protest be considered as on the behalf of all other taxpayers subject to the Columbia 93 School District levy authority, so that all such taxpayers pay the same levy rate, as per Boone County Circuit Court Case No. 01CV168043."

See Pltf CC Exh 1. Boone County Circuit Court Case No. 01CV168043 was a reference to Henry Lane's suit to enjoin the tax rate filed on behalf of all taxpayers.

Count II of the suit filed January 14 was the claim for refund of taxes paid under protest made on behalf of the class of taxpayers. L.F. 45-52. Paragraphs 23 and 24 of this Amended Petition alleged that the tax rate was illegal, that its levy had been mistakenly or erroneously levied by the School and Collector, and that all class members had mistakenly or erroneously paid their 2001 taxes, for which refund or credit was requested pursuant to § 139.031.5 RSMo.

The record revealed that 103 other taxpayers also paid their taxes under protest, but they did not file their own suit for refund. Pltf CC Exh 3. The record also revealed

many real estate property taxpayers had escrowed their taxes, and did not receive tax statements. Pltf CC Exhibits 3, 6, 8, 9, 10, 12, 13.

On February 21, 2002, Defendant Collector filed motions to either add the Columbia 93 School District as a necessary and indispensable party defendant, or alternatively that the suit be dismissed for failure to join a necessary and indispensable party. (L.F. 56-70) Plaintiff opposed addition of the School District as a party defendant on the grounds such was precluded by statute, §139.031 RSMo. (L.F. 71-80) On April 30, 2002, the trial court overruled the Collector's motion to dismiss, but granted the Collector's motion to add the School District as a party defendant. (L.F. 81)

On May 20, 2002, Defendant School District filed motions, answer, and affirmative defenses to Plaintiffs' Amended Petition. (L.F. 82-92)

On June 21, 2002, Plaintiffs filed motions and suggestions requesting certification as a class action. (L.F. 93-113) Defendants filed suggestions opposing certification on the grounds class certification was not a legally available mechanism. (L.F. 117-158) Defendants opposed class certification on the ground that, as §139.031.1 RSMo required individual taxpayer protests and refund suits, the class action vehicle was prohibited by the doctrine of sovereign immunity. Plaintiffs filed proposed findings and conclusions contending that the class action mechanism was available (L.F. 159-166). Proposed conclusions of law 2 through 7 requested the Court to find that a class action was statutorily permitted in cases of taxes paid "mistakenly or erroneously" pursuant to an unlawful tax rate as allowed by § 139.031.5 RSMo.

On August 2, 2002, the Court conducted an evidentiary hearing on class certification. (L.F. 8) At hearing Plaintiffs made a prima facie case meeting the prerequisites of class certification. T. 3-80. Plaintiffs presented testimony of the Defendant Collector Lensmeyer who testified that her office billed the disputed tax rate, that this tax rate was applied to every taxpayer owning property subject to the School District's taxing authority, that there were 52,061 real estate tax bills and 50,421 personal property tax bills issued for the entire county, and in the Collector's opinion there were over 30,000 members of the proposed class of plaintiff taxpayers. T. 3-10. Plaintiffs also presented the testimony of eight named plaintiffs who indicated their willingness to be class representatives, and to fairly and adequately represent the class. T. 22-67. Plaintiffs submitted a list of some 103 taxpayers that had protested their 2001 school taxes, but had not filed separate refund lawsuits. Pltf. Exh. 3.

Defendant Columbia 93 School District cross-examined plaintiff witnesses regarding the details of their tax payments and protests, regarding their interpretation of their duty to fairly and adequately represent the class, and regarding their opinions as to responsibilities for the expenses of publication and or notice if the class were certified as an "opt out" class as opposed to a mandatory class. T. 33-36; 44-45; 50; 54; 57; 60; 63.

Neither Defendant presented any testimony from its own witnesses opposing the prerequisites for class certification. T. 69.

After the conclusion of the evidentiary portion of the class certification hearing, the Court heard presentations from counsel as to the propriety of class certification. T. 69-80. Plaintiffs advised the Court they were seeking class certification based upon

§ 139.031.5 RSMo, which does not require individual protests of taxes that were mistakenly or erroneously paid due to an illegal tax rate, but instead allowed refunds of such taxes to be made upon application within one year of payment. Plaintiffs suggested these statutory conditions were met by the Amended Petition, therefore any sovereign immunity from class actions had been waived by the legislature. T. 69-73, 78-79.

Defendant Collector and Defendant School District opposed class certification on the grounds class certification was barred by sovereign immunity, and that §139.031.1 RSMo, requiring individual protests and refund suits, did not waive immunity to this class action. T. 73-77.

By Order of August 21, 2002, the Trial Court refused to certify the matter as a class action because "as a matter of law a class action cannot be certified in this case and that the Plaintiffs should not be appointed as class representatives". (L.F. 167; A2) This decision did not further elucidate the Court's analysis of the application of sovereign immunity to class certification.

The case then proceeded to trial before the Court, without jury, on August 23, 2002. (L.F. 8) Plaintiffs presented the testimony of Collector Patricia Lensmeyer, Columbia School District's Director of Business Services and Treasurer Kevan Snell, and Plaintiff Henry Lane. T. 82-201. This evidence, ignoring the testimony of Mr. Lane, consisted of testimony and exhibits regarding the budgeted revenues, the total assessed valuation, calculation of tax rates, tax collections, tax revenues, and comparison of tax revenues to the amounts set forth in the School District's budget. Defendant Lensmeyer presented no evidence.

Defendant School District elicited testimony on its cross examination of Mr. Snell during Plaintiffs' case. T. 113-153. In its case the School District presented the testimony of education expert witness Chris Straub. T. 202-220. Mr. Straub opined that if the School District in 2001 had set the property tax rate Plaintiffs believed was required by § 67.110.2 RSMo, a property tax rate which would produce the amount of revenues the School budgeted, that lower tax rate would constitute a voluntary tax rate reduction causing the School the loss of $4,043,000 in state financial aid provided under the auspices of Chapter 163 RSMo. T.143-144, 204-211. The following was Mr. Straub's ultimate conclusion, T. 206-207:

"Q. So if there be a reduction to comply with a budgeting requirement, that would still be a voluntary rollback and be a loss of state aid?

A. That is correct."

On September 27, 2002 the Trial Court entered Judgment (L.F. 168-169; A4). The Judgment found witnesses Kevan Snell and Dr. Chris Straub as knowledgeable and qualifying as experts with respect to school finance, and that their testimony was credible. The Trial Court found that the Columbia 93 School District, in establishing its property tax levy rate for 2001 did not violate the provision of § 67.110 RSMo or § 137.073, RSMo, as alleged in the Amended Petition. (L.F. 168).

The Judgment did not explain its conclusions in any further detail.

Court of Appeals Opinion

This appeal was filed with the Missouri Court of Appeals on October 28, 2002. (L.F. 170). On May 18, 2004 the Court of Appeals issued an Opinion. After considering

motions for transfer or rehearing from the School and the Collector, on June 29, 2004 the Court of Appeals modified its opinion on its own motion by the addition of new footnotes 3 and 9 in the modified Opinion. (A6)

The Opinion, as so modified, determined that the School's property tax rate, when multiplied times total assessed valuation would produce $4,711,883 more than the School budgeted for its needs. The Opinion decided this violated the requirement of Section 67.110.2 RSMo that the tax rate be calculated to produce substantially the same revenues as required in the annual budget. The Opinion determined the School's "94% collection rate" was unauthorized. The Opinion refused class certification because it was not specifically permitted by statutes. Finally, the Opinion dismissed Plaintiff's Point challenging joinder of the School as a party Defendant as being moot.

The Collector and the School District filed Applications for Transfer. This Court accepted transfer by Order of August 24, 2004.

POINT RELIED ON NO. I

THE TRIAL COURT ERRED IN ITS JUDGMENT DETERMINING THAT THE SCHOOL DISTRICT'S 2001 TAX RATE DID NOT VIOLATE THE PROVISIONS OF § 67.110.2 RSMO BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHED THAT THE TAX RATE WOULD PRODUCE SUBSTANTIALLY MORE REVENUE THAN BUDGETED IN THAT MULTIPLYING THE TAX RATE ($4.7544 PER $100.00 OF ASSESSED VALUATION) TIMES THE TOTAL ASSESSED VALUATION OF PROPERTY WITHIN THE DISTRICT ($1,281,852,353), WOULD PRODUCE TOTAL CURRENT REVENUE OF

$60,944,388, WHICH WAS SUBSTANTIALLY MORE ($4,711,883 MORE) THAN THE TOTAL CURRENT REVENUE BUDGETED ($56,232,505). [2]

Authorities

St. Louis-Southwestern Railway v. Cooper, 496 S.W.2d 836, 842 (1973)

Southwestern Bell Telephone Co. v Hogg, 569 SW2d 195, 199-201 (Mo 1978)

Mo. Rev. Stat. §67.110 (2000)

Mo. Rev. Stat. §137.073.6 (2000)

POINT RELIED ON NO. II

THE TRIAL COURT ERRED IN ITS JUDGMENT ACCEPTING THE SCHOOL'S DEFENSE THAT LOWERING THE TAX RATE TO THAT RATE REQUIRED BY §67.110.2 RSMO WOULD HAVE CONSTITUTED A

[2] Plaintiffs' Amended Petition, and their Points before the Court of Appeals, did not directly attack the School's use of a 6 % uncollectible rate that the Opinion of the Court of Appeals found unauthorized. Evidence concerning the use of this uncollectible rate was received at trial, without objection. In this Brief, the tax rates contended required by law here have been modified to reflect the Court of Appeals' conclusion that no uncollectible rate was authorized. If This Court disagrees with that assumption, and allows the use of a 6 % uncollectible rate, the amount by which the total current revenue would have exceeded the budgeted revenue would have been $1,055,220, and the correct tax rate would have been $4.6668.

"VOLUNTARY" TAX RATE REDUCTION CAUSING LOSS OF STATE FINANCIAL AID PURSUANT TO CHAPTER 163 RSMO, BECAUSE SUCH A TAX RATE REDUCTION WOULD HAVE BEEN STATUTORILY REQUIRED, IS NOT "VOLUNTARY", IN THAT COMPLIANCE WITH § 67.110 RSMO IN LOWERING THE PROPERTY TAX RATE TO PRODUCE THE LOCAL PROPERTY TAX REVENUE BUDGETED IS NOT A "VOLUNTARY" TAX REDUCTION CAUSING LOSS OF STATE AID, BUT INSTEAD IS A NON-DISCRETIONARY, OR "INVOLUNTARY", ACT MANDATED UPON THE SCHOOL DISTRICT BY § 67.110 RSMO WHICH WOULD NOT CAUSE A LOSS OF STATE AID PURSUANT TO CHAPTER 163 RSMO.

Authorities

Allen v. Public Water Supply Dist. No. 5 of Jefferson County, 9 SW3d 537, 540 (Mo App 1999)

Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874 (Mo.banc 1983)

State ex rel. Riordan, et al. v. Dierker, 956 S.W.2d 258, 260 (Mo banc 1997)

Mo. Rev. Stat. § 67.110 (2000)

Mo. Rev. Stat. §163.011(13) (2000)

POINT RELIED ON NO. III

THE TRIAL COURT ERRED IN ITS ORDER DENYING CLASS CERTIFICATION ON THE GROUND THAT "AS A MATTER OF LAW A CLASS ACTION CANNOT BE CERTIFIED IN THIS CASE" BECAUSE THE

COMMON LAW DOCTRINE OF VIRTUAL REPRESENTATION, CASE LAW, AND STATUTORY LAW (§ 507.070 RSMO and § 139.031.5 RSMO), AND ARTICLE X, SECTION 3 OF THE MISSOURI CONSTITUTION ALLOW THIS CASE TO PROCEED AS A CLASS ACTION, WITH § 139.031.5 PERMITTING REFUND OF TAXES "MISTAKENLY OR ERRONEOUSLY" PAID PURSUANT TO AN ILLEGAL TAX RATE UPON APPLICATION FILED WITHIN ONE YEAR OF TAX PAYMENT, WITHOUT THE NECESSITY OF INDIVIDUAL TAXPAYER PAYMENTS UNDER PROTEST REQUIRED BY § 139.031.1 RSMO, AND WITHOUT THE NECESSITY OF A SUIT FOR REFUND FILED WITHIN NINETY DAYS THEREAFTER REQUIRED BY § 139.031.2 RSMO.

Authorities

Beatty v. St. Louis Sewer District, 914 SW2d 791 (Mo banc 1995)

Community Federal Savings and Loan v Director of Revenue, 752 SW2d 794 (Mo banc 1988)

Fort Zumwalt School Dist. v State, 896 SW2d 918, 921 (Mo banc 1995)

Ring v Metropolitan St. Louis Sewer Dist., 969 SW2d 716 (Mo banc 1998)

Mo. Const. Art. I, § 14

Mo. Const. Art. X, § 3

Mo. Rev. Stat. §67.110 (2000)

Mo. Rev. Stat. §137.073 (2000)

Mo. Rev. Stat. §139.031 (2000)

Mo. Rev. Stat. §507.070 (2000)

Supreme Court Rule 52.08

POINT RELIED ON NO. IV

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT COLLECTOR'S MOTION TO JOIN THE COLUMBIA 93 SCHOOL DISTRICT AS A NECESSARY AND INDISPENSABLE PARTY DEFENDANT TO A TAX REFUND ACTION BROUGHT PURSUANT TO § 139.031 RSMO, BECAUSE UNDER THIS STATUTE THE COLLECTOR IS THE ONLY PROPER PARTY DEFENDANT, IN THAT THERE ARE PROPERLY ONLY TWO PARTIES TO A CIRCUIT COURT PROCEEDING BASED ON THIS STATUTE – THE "TAXPAYER" AND THE "COLLECTOR".

Authorities

Alexian Brothers Sherbrooke Village v St. Louis County, 884 SW2d 727 (Mo App E.D. 1994)

Bartlett v. Ross, 891 S.W.2d 114 (Mo banc 1995)

Maplewood-Richmond Heights School District v. Leachman, 735 S.W.2d 32 (Mo.App. E.D. 1987)

State ex rel Brentwood School District v State Tax Commission, 589 S.W.2d 613 (Mo. 1979)

Mo. Rev. Stat. §139.031 (2000)

Supreme Court Rule 54.02

Overview of Case

The determinations made by the Court of Appeals Opinion regarding the property tax rate and refund of taxes mistakenly or erroneously paid were reasonable and common sense interpretations of the legislature's intent with respect to § 67.110.2 RSMo and § 139.031.5 RSMo. Respondents had no true basis for requesting transfer of this case. At the time this case is submitted, This Court may very well have reason to believe transfer was improvidently granted.

Generally speaking, the concerns expressed by Respondents are not with the interpretations of law made by the Court of Appeals, but with the laws themselves. Rather than bringing their concerns to the state courts, they should instead be taking them to the state legislature which enacted the laws and has the power to change them.

With the enactment of § 67.110 RSMo and §139.031 RSMo, the legislature intended to assist taxpayers. § 67.110 RSMo limits the taxes taxpayers pay to the School District to that which the School budgets. §139.031 RSMo intends to provide taxpayers with an opportunity to get their taxes refunded when they are overcharged. Respondent School District appears to be intent upon taking and keeping all the tax money it can, and is asserting every means possible to destroy the rights the legislature intended taxpayers to have.

The taxpayers depend on our Courts to be mindful of what is going on, and reach decisions that are fair, just, equitable, and reasonable for all parties involved.

Introduction to Argument

The Opinion of the Court of Appeals, if allowed to stand, will result in the nine named taxpayer plaintiffs receiving refunds totaling $325.58 in the aggregate. Because class certification was refused, no refund will be provided to the other 30,000 taxpayers. The School will lose virtually nothing of the **$4,711,883** of unlawful taxes collected.[3]

The Opinion determined that § 67.110.2 RSMo required the School's tax rate to be calculated to produce substantially the same amount of money as budgeted. The Opinion rejected the School's various arguments made to justify a tax rate that would produce more local property tax than budgeted. The Opinion also held that Schools, in setting their tax rate, are not authorized to assume some taxes will be "uncollectible".[4]

This Opinion will not impart significant financial harm on the Columbia 93 School District. The opposite is true. By holding that compliance with § 67.110.2 RSMo does not constitute a "voluntary tax rate rollback", the Opinion assured the School it will not lose $4,043,000 in state financial aid as the School had claimed.

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[3] If This Court determines use of the 6 % "uncollectible" rate was authorized, the aggregate refund for the named Plaintiffs would be $77.52, with the total amount of unlawful taxes collected being $1,055,220.

[4] The School District's 94% "collectibles" rate actually represented the School's assumption it would receive 94% of the 2001 fiscal year tax revenues before March 1, 2002. It did not represent the assumption that only 94% of the billed 2001 taxes would be received in total.

Neither the Collector nor the School in their transfer applications challenged the Opinion's determination that the tax rate was unlawful. Instead, their transfer applications assert three discrete grounds for transfer, which they hope will, among other things, prevent the School from having to lower its tax rate and refund money to taxpayers:

1. The Opinion erroneously determined that, when an unlawful tax rate was imposed, taxpayers could pursue refunds under the provisions of § 139.031.5 RSMo without complying with the provisions of § 139.031.1 and .2 RSMo, which require payment of taxes under protest and suit for refund instituted within 90 days thereafter.
2. The Opinion erroneously subjected the budgeting process of the School District to judicial review.
3. The Opinion erroneously interpreted the "calculated levy" provisions of § 163.011(13) RSMo.

The first ground is without foundation.

Plaintiffs' lawsuit claimed that taxpayers had mistakenly or erroneously overpaid property taxes to the Respondent school district because the tax rate it set for 2001 was illegal and excessive under § 67.110.2 RSMo. They asked for a refund under subsection 5 of § 139.031 RSMo which requires the collector to return mistakenly or erroneously paid taxes when a timely refund application is submitted.

The nine named Plaintiffs protested their tax payments in compliance with § 139.031.1 RSMo. Pltf. CC Exh. 1. They filed this suit for refund of overpayment in

compliance with § 139.031.2 RSMo. Their amended petition asked for their refund pursuant to § 139.031.2 and § 139.031.5 RSMo for themselves, and asked for refunds to the class pursuant to § 139.031.5 RSMo. See paragraphs 13, 22, 23, 28, and the prayer of Count II, L.F. 48-52.

The Opinion of the Court of Appeals properly and correctly ruled that the 9 Plaintiffs were entitled to a refund of taxes mistakenly or erroneously paid under an unlawful tax rate pursuant to § 139.031.5 RSMo. It utilized the definition of the terms "mistakenly or erroneously paid" that had been established by previous appellate court decisions. It determined that these words mean taxes that were not owed at the time they were paid, as compared to taxes lawfully and properly assessed. In other words, taxes paid under an illegal tax are considered to be "erroneously" paid for purposes of § 139.031.5 RSMo. It observed that an illegal tax includes a tax that is levied without statutory authority. (Authorities for these conclusions are contained within the Opinion.)

The Appeals Court ruling was a sensible and practical interpretation of law. It means, in effect, that once a court or other proper authority determines a tax rate is unlawful, it isn't necessary for those taxpayers not involved in that legal action who paid the same rate to repeat that legal process in order to get a refund of the taxes they overpaid. All they have to do is timely file a refund application with the county collector.

Respondents argue that the Court's Opinion ignores and changes established case law. They contend this law requires protest and lawsuit within 90 days afterwards to recover mistakenly or erroneously paid taxes under subsection 5 of § 139.031 RSMo. A reading of the cases they cite reveals they are wrong as to what the established law

requires. Several of the cases either don't mention subsection 5, or have nothing of substance to say about it. Two of the cases contradict the Respondents by declaring that subsection 5 pertains only to taxes mistakenly or erroneously paid, and not to taxes paid under protest.

In *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo banc 1994), This Court declared at page 8 that "As we have noted, subsection 5 pertains only to taxes 'mistakenly or erroneously paid', and not, as in this case, to taxes paid under protest". This Court made a similar observation in *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo banc 1988), declaring at page 566 that "...plaintiffs failure to protest the taxes in question does not prevent it from seeking a refund of taxes 'mistakenly or erroneously paid'".

Subsection 5 cannot reasonably be read to require protest at the time of tax payment and refund suit within 90 days thereafter. In 2001 and 2002, Subsection 5 expressly allowed refund by application made within one year after the tax was mistakenly or erroneously paid. In 2003 this subsection was amended to allow such applications to be made within three years after payment. Respondents' contention that the subsection 5 refund application is subject to the requirement of a refund suit filed within 90 days of payment under protest directly conflicts with the statutory language allowing one year or three years.

As the legislature has expressly provided the one year or three year periods, This Court must recognize that the language of subsection 5 precludes acceptance of Respondents' contention. This Court's responsibility is to ascertain the intent of the

General Assembly from language used and to give effect to that intent. All provisions of a statute must be harmonized and every word, clause, sentence and section must be given some meaning It is the legislature, not the Opinion, that created the possibility that taxes collected pursuant to an unlawful rate may not be retained by the taxing authority.

All the cases cited by Respondents involve real estate property valuations, assessments, and classifications. None involve an illegal tax rate. The Opinion of the Court of Appeals, as noted by Amicus Missouri School Boards' Association at page 1 of their suggestions in support of transfer, "...is a first-impression construction of ... 139.031.5 RSMo". As the Association notes at page 2, "No court has relied on Section 139.031.5 as a remedy for the levy of an allegedly illegal tax rate until now. The reported cases interpreting Section 139.031.5 involve disputes regarding property valuations or assessments, not challenges to the rate set".

The Court's decision in this case will be precedent-setting. The case law presented by Respondents is not on point. Respondents were remiss in suggesting that case law was in conflict with the Opinion of the Court of Appeals.

Respondent Collector claims this Opinion would require her to determine the legality of tax rates which is properly a responsibility of the judiciary. This fear is unfounded. No taxpayer would be entitled to a refund under Section 139.031.5 RSMo due to an allegedly illegal tax rate until some court or other proper authority had declared the rate improper.

Instead of emasculating subsections 1 and 2 of § 139.031 RSMo to the point of meaninglessness, as the Respondents claim, the Court's Opinion has actually made

subsection 5 meaningful. Up to now the appellate courts have construed it so strictly that it has become practically meaningless, with only one taxpayer who used it ever getting a favorable court ruling. As noted by Amicus Missouri School Boards' Association, at page 2 of its suggestions for transfer, "These courts have interpreted 'mistakenly and erroneously' narrowly and insisted that taxpayers rely instead on other available remedies".

The second ground for transfer is devoid of merit. The Opinion simply held that the tax rate was not lawful in that it would produce substantially more revenue than the School's own budget stated its needs were, a violation of the mandate of § 67.110.2 RSMo. The Plaintiffs did not challenge the School's budgeting process. The Opinion itself rejected this contention, at page 25, when it stated "this appeal does not involve a challenge to the District's budgeting process….Rather, this appeal involves a challenge to the District's ability to set its tax rate to meet its declared needs, in accordance with § 67.110.2."

The third ground—that the Opinion misinterprets the "voluntary rollback" provisions of the "calculated levy" statute, §163.011(13)—was correctly and accurately disposed of by the Court of Appeals. The disposition reached by the Court of Appeals—that compliance with Section 67.110 RSMo does ***not*** trigger the voluntary rollback loss of state aid—actually *protected* the School District from the loss of $ 4,043,000 it claimed compliance with § 67.110.2 RSMo would cause. Plaintiffs suggest that the School raised this third ground for rehearing simply to increase the chance transfer would

be accepted. There is no reasonable basis to conclude the School wants this determination of the Court of Appeals reversed, creating a risk of loss of $ 4,043,000.

Standard of Review

In a case tried without a jury, "[a]ppellate review is [ ] undertaken pursuant to Rule 84.13(d). The judgment will be affirmed unless there is no evidence to support it, the judgment is against the weight of the evidence, or the judgment erroneously declares or applies the law. [cite omitted]. Fact issues on which no specific findings are made shall be considered as having been found in accordance with the result reached. *Id*.; Rule 73.01(c)." *Kleeman v. Kingsley, et al*., 88 S.W.3d 521, 522 (Mo.App.S.D. 2002). However, "[i]f the evidence is uncontroverted or admitted, so that the real issue is legal in nature, this court need not defer to the trial court's judgment." *Burleson v. Director of Revenue, State of Missouri*, 92 S.W.3d 218, 220 (Mo.App.S.D. 2002).

Standard of Construction regarding taxation statutes

Taxing statutes must be strictly construed in favor of the taxpayer and against the taxing authority. *Missouri Pacific Railroad Co. v Kuehle*, 482 SW2d 505 (Mo 1972); *Missouri Pacific Railroad Co. v Campbell*, 502 SW2d 354 (Mo 1973); *Asarco v McHenry*, 679 SW2d 863 (Mo banc 1984).

These standards of review and construction apply to all Points herein, except for Point IV, which standard of review includes an abuse of discretion standard.

ARGUMENT

POINT RELIED ON NO. I

THE TRIAL COURT ERRED IN ITS JUDGMENT DETERMINING THAT THE SCHOOL DISTRICT'S 2001 TAX RATE DID NOT VIOLATE THE PROVISIONS OF § 67.110.2 RSMO BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHED THAT THE TAX RATE WOULD PRODUCE SUBSTANTIALLY MORE REVENUE THAN BUDGETED IN THAT MULTIPLYING THE TAX RATE ($4.7544 PER $100.00 OF ASSESSED VALUATION) TIMES THE TOTAL ASSESSED VALUATION OF PROPERTY WITHIN THE DISTRICT ($1,281,852,353), WOULD PRODUCE TOTAL CURRENT REVENUE OF $60,944,388, WHICH WAS SUBSTANTIALLY MORE ($4,711,883 MORE) THAN THE TOTAL CURRENT REVENUE BUDGETED ($56,232,505).

Argument

Section § 67.110.2 RSMo requires all taxing political subdivisions, including schools, but excluding counties, to set a tax rate that is calculated to produce substantially the same amount of revenues as stated in its annual budget.

At trial, the School District presented two defenses to Judge Conley. The first was that a school budget is a moving target which does not provide firm revenue figures that can be utilized in the § 67.110.2 RSMo calculation. The second was that utilizing the tax rate required by § 67.110.2 RSMo would cause it to lose state financial aid.

Before the Court of Appeals, the School District abandoned the first ground asserted at trial, continued pursuit of the second ground, and added several new "defenses" never presented to the trial court. Nevertheless, the Court of Appeals considered those newly raised positions.

The Opinion of the Court of Appeals rejected the School's arguments that Section 67.110.2 RSMo was not applicable to the School's tax rate. The Opinion rejected the School's argument that Section 164.011 RSMo was a more specific statute controlling Section 67.110.2 RSMo. The Opinion rejected the School's argument that it could retroactively amend its budget for purpose of setting its tax rate after that rate had been established. The Opinion held that the School was required by Section 67.110.2 RSMo to set a tax rate which, when taken times the total assessed valuation, would produce the revenues its budget had determined it needed.

A review of the law reveals that the Opinion was correct in these respects. § 67.110 RSMo is captioned **"Fixing ad valorem property tax rates, procedure….."** The relevant portions of § 67.110 RSMo are as follows:

67.110.1:

> "Each political subdivision in the state, except counties, shall fix its ad valorem property tax rates as provided in this section not later than September first for entry in the tax books. Before the governing body of each political subdivision of the state, except counties, as defined in section 70.120, RSMo, fixes its rate of taxation, its budget officer shall present to its governing body the following information for each tax rate to be levied: The assessed valuation by category of real, personal, and other tangible property in the political subdivision as entered in the tax book for the fiscal year for which the tax is to be levied, as provided by subsection 3 of section 137.245, RSMo, the assessed valuation by category of real, personal and

other tangible property in the political subdivisions for the preceding taxable year, the amount of revenue required to be provided from the property tax as set forth in the annual budget adopted as provided in this chapter, and the tax rate proposed to be set. ….."

67.110.2:

"….The tax rates shall be calculated to produce substantially the same revenues as required in the annual budget adopted as provided in this chapter. …"

67.110.3:

"Each political subdivision of the state "shall fix its property tax rates in the manner provided in this section for each fiscal year which begins after December 31, 1976. …"

A39 (underlining added for emphasis).

It is pointed out here that the Columbia 93 School District's tax rate hearing policy, Pltf. Exh. 8, and newspaper notice, Pltf. Ex. 9, acknowledged the School's obligation to comply with §67.110 RSMo by setting a tax rate calculated to produce substantially the same revenue as required in the annual budget.

§ 67.110.2 RSMo states that tax rates shall be calculated… The term "shall" as used in laws expresses what is mandatory, not permissive. *Allen v Public Water Supply Dist. No. 5 of Jefferson County*, 9 SW3d 537, 540 (Mo App 1999). § 67.110 RSMo is a mandatory statute the School District is required to adhere to for purposes of fixing property tax rates. This statute sets forth a mandatory calculation the School District is to

follow in establishing a tax rate to produce the revenues called for in its budget. While the School District has the discretion to determine its local property tax revenue needs, once that is determined in its budget, § 67.110 RSMo imposes mandatory calculations to achieve that revenue.

In *Southwestern Bell Telephone Co. v Hogg*, 569 SW2d 195, 199-201, (Mo 1978), the Missouri Supreme Court, en banc, recognized the nature of this calculation:

> "There are three factors in taxation (1) Assessed Valuation, (2) Amount of money necessary to be raised, (3) Rate of Levy. County Courts, City Councils, and School Boards must have the assessed valuation and the aggregate amount of money to be raised before they can fix the rate of levy. The rate of levy is always the last factor to be determined, and to be obtained as a quotient, the assessed valuation being the divisor and the amount of taxes the dividend." (underlining added).

This holding recognizing these three factors of property taxation was repeated by the Supreme Court in *Southwestern Bell Telephone Company v Mitchell*, 631 SW2d 31, 36 (Mo banc 1982).

Like the Supreme Court's recognition of the three factors in taxation, Subsection 1 of § 67.110 RSMo requires the budget officer of the school, prior to the school's fixing of its levy rate, to present to the School Board the same three factors[5]:

[5] The evidence indicates that the School did not make the tax rate calculation required by § 67.110.2 RSMo. If it had divided the budgeted local property tax revenue by the total

a. assessed valuation of property within the school district for the fiscal year;

b. the amount of property tax revenue called for in the School District's budget;

c. the tax rate proposed to be established. *See* A39.

§ 67.110.2 RSMo requires the tax rate to produce "substantially the same" revenue that the School District's budget called for. *See* A39. The Supreme Court of Missouri has interpreted the word "substantially" for purpose of property tax rates to be synonymous with "practically", "nearly", "almost", "essentially", and "virtually." *St. Louis-Southwestern Railway v. Cooper*, 496 S.W.2d 836, 842 (1973); *Southwestern Bell Telephone Co. v Hogg*, 569 SW2d 195, 199-201, (Mo 1978). As stated by the Supreme Court in *Hogg*, p. 199-201;

"All that is required is for the school districts to make the mathematical computation using the known factors of revenue need and new increased valuation to arrive at the rate which will produce the needed revenue when applied to the

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assessed valuation, it would have arrived at a lawful tax rate of $ 4.3869. Instead the School simply set its tax rate at the highest level permitted under the Missouri Constitution and state statute. The School set a property tax rate of $4.7544 per $100 of assessed valuation. That rate had been calculated by the School on worksheets provided by the State Auditor's office, and represented a maximum tax rate, or ceiling, the School had under the Missouri Constitution and state statute. (See Tax Rate Summary Page attached to the letter in Pltf. Exc. 24).

assessed valuation. The result will not be the exact amount of estimated need from taxation but it can and should be very close to it."

In summary, §67.110 RSMo reflects common sense. A property tax rate should produce the amount of revenue a School District says it needs—not any more and not any less.

The statute controlling the exactitude of tax rates is § 137.073.6 RSMo. *See* A41. That statute requires the School, in setting the tax rate, to express that rate rounded to the nearest 1/100th of one cent, rounding up a fraction greater than or equal to 5/1000th of a cent:

> "Each taxing authority shall express its proposed tax rate in a fraction equal to the nearest one/one hundredth of a cent. A taxing authority shall round up a fraction greater than or equal to five/one thousandth of one cent to the next higher one/one hundredth of a cent."

Thus the maximum permissible deviation of a tax rate is 1/100th of one penny, or $0.0001, not the two and one-half to five and one-half percent deviation the School District argued and the Opinion rejected.

Application and Analysis

The statutorily required tax calculation begins with the Columbia 93 School District's budgeted property tax revenue and total assessed valuation. The following tax rate calculation factors[6] were undisputed:[7]

Total Assessed Valuation	$1,281,852,353
Required Local Taxes[8]	$56,232,505

The tax rate set by the School District ($4.7544) multiplied by the total assessed valuation of taxable property within the School District ($1,281,852,353) would produce tax billings of $60,944,388. The $60,944,388 exceeds the budgeted tax revenue of $56,232,505 by $4,711,883.

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[6] § 164.011 RSMo requires the School to prepare an estimate of the amount of money to be raised by taxation for the ensuing year.

[7] See Pltf. Exh. 4, the School's 2001-2002 budget; Plaintiffs Ex 5 at A48, the revenue page 76 from the School's budget; Pltf. Exh. 9 at A49, the School's Notice of Tax Rate Hearing; and Pltf. Exh. 10 at A50, the Estimate of Required Local Taxes setting the 2001 School tax rate. See also T. 109-112, where the School's Treasurer and Director of Business Services, Kevan Snell, found by the Trial Court as a knowledgeable and credible expert witness in the subject of school finance, admitted that these calculation factors were correct.

[8] This is the amount of tax revenues needed, as shown in the budget, Pltf Exh 5, line 5111. A48.

The question for the Court to determine is whether the School District's tax rate complied with § 67.110 RSMo. Was the tax rate adopted by the School District "calculated to produce substantially the same revenues as required in the annual budget"?

The short answer to this question is "no". § 137.073.6 RSMo requires the tax rate to be calculated to the nearest 1/100th of a cent, rounding up fractions at or over 5/1000th of a cent, and rounding down fractions less than 5/1000th of a cent. *See* A41. Reading §67.110.2 RSMo and § 137.073.6 RSMo in *pari materia*, and applying the maximum statutory tolerance level of 1/100 of one cent per $100.00 assessed valuation to the total assessed valuation, $1,281,852,353, produces a maximum revenue tolerance of $1,281.86. The correct tax rate to apply to each $100.00 of total assessed valuation ($1,281,852,353) to produce the budgeted revenue of $56,232,505, complying with § 137.073.6 RSMo, was $4.3869 (or $4.6668 if the six percent uncollectibles rate is determined to have been authorized).

The judgment summarily concluded that the Columbia 93 School District, in establishing its property tax levy rate for 2001, did not violate § 67.110 RSMo. L.F. 168; A4. The judgment failed to provide any calculation or analysis in support of this conclusion. As none of the evidence is disputed as to the figures used in the above tax rate calculation, the issue is a legal issue. This Court need not defer to the Trial Court's judgment. *Burleson* at 220.

In its Application for rehearing, the School District asserts that the Opinion of the Court of Appeals erroneously makes the budgeting process of school districts subject to judicial review. This assertion is specious. Neither Plaintiffs nor the Opinion reviewed

or challenged the budgeting process. All Plaintiffs did was take the result of that budget process—a statement of local property tax revenue needs of $56,232,505—and challenge the School's compliance with Section 67.110.2 RSMo. .

The Court of Appeal's Opinion, at page 25, rejected this contention, stating that this appeal does not involve a challenge to the District's budgeting process, as the appellants do not question the District's authority to budget $56,232,505 in needs from local property taxes, rather it involved a challenge to the District's ability to set its tax rate to meet its declared needs, in accordance with Section 67.110.2 RSMo.

Relief Requested

Plaintiffs request reversal of the Trial Court's decision that the School District's 2001 property tax rate did not violate the provisions of § 67.110 RSMo. Plaintiffs request a determination that application of law to the undisputed evidence results in a lawful tax rate of $4.3869 per $100.00 of assessed valuation (or $4.6668 in the event the Court accepts use of a 94 % collection rate instead of 100%). It is requested that the case be remanded with direction to enter judgment in favor of the Plaintiffs for the correct lawful tax rate, and costs. If This Court finds in favor of Plaintiffs on Point III, Plaintiffs request that the reversal be with direction to enter judgment in favor of the class, with direction for further proceedings to consider the award of costs and attorneys' fees in accordance with Supreme Court Rule 52.08 (b) (1) or (b)(2).

POINT RELIED ON NO. II

THE TRIAL COURT ERRED IN ITS JUDGMENT ACCEPTING THE SCHOOL'S DEFENSE THAT LOWERING THE TAX RATE TO THAT RATE REQUIRED BY §67.110.2 RSMO WOULD HAVE CONSTITUTED A "VOLUNTARY" TAX RATE REDUCTION CAUSING LOSS OF STATE FINANCIAL AID PURSUANT TO CHAPTER 163 RSMO, BECAUSE SUCH A TAX RATE REDUCTION WOULD HAVE BEEN STATUTORILY REQUIRED, NOT "VOLUNTARY", IN THAT COMPLIANCE WITH § 67.110 RSMO IN LOWERING THE PROPERTY TAX RATE TO PRODUCE THE LOCAL PROPERTY TAX REVENUE BUDGETED IS NOT A "VOLUNTARY" TAX REDUCTION CAUSING LOSS OF STATE AID, BUT INSTEAD IS A NON-DISCRETIONARY, OR "INVOLUNTARY", ACT MANDATED UPON THE SCHOOL DISTRICT BY § 67.110 RSMO WHICH WOULD NOT CAUSE A LOSS OF STATE AID PURSUANT TO CHAPTER 163 RSMO.

Argument

At trial Defendant School District relied upon a "defense" that compliance with § 67.110 RSMo would create state aid losses in the amount of $4,043,000 pursuant to the provisions of a separate statute. State aid is provided to Missouri Schools pursuant to the provisions of Chapter 163 RSMo. State aid is revenue which is separate from local property tax revenue.

The School District witnesses testified that lowering the tax rate from $4.7544 to the tax rate required by § 67.110 RSMo would have constituted a "voluntary" reduction that would have caused the loss of some financial aid provided by the state. See

Defendant School District's cross examination of Kevan Snell, T. 140-146, and its direct examination of Dr. Chris Straub, T. 202-211

This "defense" was never pleaded as a defense in the answer of Defendant Collector (L.F. 56-59) or in the answer of Defendant School District (L.F. 82-92). Plaintiffs believe that such a "defense" lacks intellectual credibility, and lacks legal salience. If the dispute were between the state in its capacity as provider of state aid and the School District in its capacity as recipient, Plaintiffs doubt that the School District would take such a position.

Plaintiffs' opposing position would *assist* the School District in avoiding financial losses. Defendant School District's defense is patently unreasonable. This "defense" was a manipulation of statutory construction designed to distract from the plain, simple, and incontrovertible requirements of § 67.110.2 RSMo. Respondent School had no real grounds upon which to request transfer for this issue.

The starting point of this defense is that Plaintiffs' position under Point I is correct, and § 67.110.2 RSMo required the tax rate to be lower than $4.7544. It is only such a "lowering" or "rollback" of the tax rate that would trigger this "defense". Plaintiffs disagree that judicial correction of the unlawful rate equates to a "rollback". The defense then asserts that compliance with Chapter 163 RSMo would operate to cause the School District to lose $4,043,000 in state financial aid. The School District in effect is making an argument which, if it were correct, would cause itself significant financial harm.

Witnesses Snell and Straub were the sole witnesses by which this "defense" was presented. The findings in the judgment that these witnesses were qualified as experts with respect to school finance suggest that the Trial Court accepted this defense.

Witness Straub testified that in 1995 certain Schools discovered that, as a result of biennial reassessment valuation increases, the Hancock Amendment required tax rate reductions ("rollbacks") in order to be revenue neutral. (T. 204) They learned that under the then existing law these reductions would cause loss of state aid. To fix this, legislation was passed in 1996 that created a "calculated levy" formula. (T. 205). This formula was to be used in the state aid formula to keep a School District from losing state aid whenever its tax rate dropped due to reassessment, reduction in its tax rate ceiling, or an increase in its Proposition C rollback. (T. 205-206)[9].

Mr. Straub testified that in his opinion, the Department of Elementary and Secondary Education, the agency in charge of distributing state aid, would interpret the tax rate reduction required by § 67.110 RSMo as being a "voluntary" reduction causing the reduction of state aid. (T. 205-207). Dr. Straub testified the intent of § 163.011(13)

[9] The School's suggestions supporting transfer, pages 27-28, now take the position that the only time a school district retains its calculated levy is when the tax rate is reduced as a result of reassessment. This is inconsistent with Mr. Straub's testimony, which stated that the calculated levy would be retained when the tax rate was reduced by a reduction in its tax rate ceiling, an increase in its Proposition C rollback, or as the result of reassessment.

RSMo, the calculated levy statute, was to prevent school districts from taking advantage of the state of Missouri by reducing their own tax rate and having it made up by the state of Missouri. (T. 206).

As best Plaintiffs can tell from the judgment, the Trial Court accepted this "defense", albeit without adequate findings and conclusions to allow meaningful review. The judgment reads as follows:

> "The Court, after considering the pleadings, the evidence, the written memoranda filed in this case and the oral arguments presented by counsel finds the issues in favor of the Defendants and against the Plaintiffs. The Court finds that witnesses Kevan Snell and Dr. Chris Straub are knowledgeable and qualify as experts with respect to school finance in Missouri and that their testimony was credible. The Court specifically finds that the Defendant Columbia 93 School District in establishing its property tax levy rates for 2001 did not violate the provisions of Section 67.110 or Section 137.073, RSMo, as alleged in the Amended Petition."

(L.F. 168; A4)

The judgment erroneously declared or applied the law in that it failed to adhere to the mandatory requirements of § 67.110 RSMo by recognizing that § 67.110 RSMo applies to the establishment of the property tax rate whereas Chapter 163 RSMo does not apply to the establishment of property tax rates. The judgment also erroneously applies the law in failing to construe both § 67.110 RSMo and the provisions of Chapter 163 RSMo to give meaning and effect to both, without interpreting them as being inconsistent. This could have been done by determining that a tax reduction required by

§ 67.110 RSMo was not "voluntary", and would not cause a loss of state aid. Mr. Straub's conclusions were not correct legal conclusions. The Opinion of the Court of Appeals corrected these errors.

The issue in this case is the lawful property tax rate. Chapter 67 RSMo contains mandatory sections applicable to the establishment of property tax rates. Chapter 163 RSMo has nothing to do with the *establishment* of property tax rates. The issue in this case does not deal with state financial aid. The parties are not the School District, the recipient of state aid, and the state of Missouri, the provider of state aid. The parties are the taxpayers and the governmental entities setting and billing the tax rate.

This Court should not conclude that the imposition of the correct lawful rate would be a "reduction" of the original unlawful rate. It is instead a *nunc pro tunc* correction of the original rate. Clearly, this is not the type of "reduction" of a *prior year*'s tax rate that the calculated levy statute penalizes as a "voluntary rollback".

Critical to the School District's "defense" is that complying with § 67.110 RSMo would have constituted a "voluntary" tax rate reduction. Mr. Straub opined that a tax rate complying with § 67.110.2 RSMo would be a "voluntary" reduction under the calculated levy statute, § 163.011(13) RSMo, causing loss of state aid.[10]

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[10] The following is the language of Section 163.011 (13) RSMo:

"For the purposes of calculating state aid pursuant to section 163.031, for <u>any district which has not enacted a **voluntary** tax rate rollback nor increased the amount of a **voluntary** tax rate rollback from the previous year's amount, the tax rate used to</u>

There is no dispute that § 163.011 (13) RSMo twice uses the word "voluntary" in specifying what tax rate reductions will cause a loss of state aid. The statute does not define the term "involuntary". In its everyday meaning, the word "voluntary" imparts

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determine a district's entitlement shall be adjusted so that any decrease in the entitlement due to a decrease in the tax rate resulting from the reassessment shall equal the decrease in the deduction for the assessed valuation of the district as a result of the change in the tax rate due to reassessment. The tax rate adjustments required under this subdivision due to reassessment shall be cumulative and shall be applied each year to determine the tax rate used to calculate the entitlement; except that whenever the actual current operating levy equals or exceeds the tax rate calculated pursuant to this subdivision for the purpose of determining the district's entitlement, then the prior tax rate adjustments required under this subdivision due to reassessment shall be eliminated and shall not be applied in determining the tax rate used to calculate the district entitlement, except that whenever the actual current operating levy is increased by school board action to prior January 1, 2000, or by district voter approval at any time, to a level which equals or exceeds the tax rate calculated pursuant to this subdivision for the purpose of determining the districts entitlement, then the prior tax rate adjustments required under this subdivision due to reassessment shall be eliminated after five years and shall not thereafter be applied in determining the tax rate used to calculate the district entitlement." A13 (underlining added for emphasis)

actions taken by one's own choice, unconstrained by external compulsion or legal obligation. The requirements of § 67.110.2 RSMo are not "voluntary" for schools to comply with, they are mandatory.

Compliance with § 67.110 RSMo is not voluntary

§ 67.110 RSMo provides that the Columbia 93 School District "*shall* fix its ad valorem property tax rates as provided in this section…" A39 (emphasis added). Under § 67.110.2 RSMo, "the tax rates *shall* be calculated to produce substantially the same revenues as required in the annual budget adopted as provided in this chapter." A39 (emphasis added). These repeated use of the word "shall" establishes that compliance with § 67.110 RSMo is mandatory for the School District, not voluntary.

Rules of Statutory Construction

This Court should construe a reduction required by the mandatory provisions of § 67.110 RSMo not to be a "voluntary" reduction causing loss of state aid under the provisions of § 163.011(13) RSMo. Such a construction gives the intended meaning to § 67.110 RSMo. Such a construction also continues to give meaning to § 163.011(13) RSMo. Anytime a School District takes a voluntary tax rate reduction not occasioned by reassessment, and not occasioned by compliance with statute, there will still be a loss of state aid.

Such a construction is in keeping with the purpose of § 163.011(13) RSMo, as testified by Dr. Straub. It can hardly be said that a reduction *mandated by* the state of Missouri in § 67.110 RSMo is a reduction intended by a school district to take advantage *of the state of Missouri*.

The courts of Missouri have set forth several rules of construction that apply when interpreting statutory provisions. These rules support Plaintiffs construction. "In construing statutes, the Court's primary responsibility is to ascertain intent of General Assembly from language used and to give effect to that intent. [cite omitted] Furthermore, all provisions of a statute must be harmonized and every word, clause, sentence and section must be given some meaning." *Brown Group, Inc. v. Administrative Hearing Commission, et al*., 649 S.W.2d 874, 881 (Mo. banc 1983). In addition, "[s]tatutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes." *State ex rel. Riordan, et al. v. Dierker*, 956 S.W.2d 258, 260 (Mo.banc 1997); *Wells et al., v. Missouri Property Insurance Placement Facility*, 653 S.W.2d 207, 213 (Mo. banc 1983). "Appellate courts presume the legislature does not enact meaningless provisions. [cite omitted] Courts presume the legislature acts with the knowledge of statutes involving similar or related subject matters. [cite omitted] ... The term 'shall' is used in laws, regulations, or directives to express what is mandatory." *Allen v. Public Water Supply District No. 5 of Jefferson County*, 7 S.W.3d 537, 540 (Mo.App.E.D. 1999).

The Court of Appeals was correct in ruling a reduction of the tax rate to comply with § 67.110.2 RSMo was mandatory, and not a voluntary reduction causing loss of state aid. The Opinion held, inter alia, that the phrase "voluntary tax rate rollback" is not defined in the statute. Giving the phrase its plain and ordinary meaning, a voluntary rollback would not include fixing the tax rate to comply with the mandatory provisions of 67.110.2 RSMo, and the School's argument was thus without merit.

Relief Requested

Plaintiffs request a determination that the judgment's conclusion that compliance with § 67.110.2 RSMo would constitute a "voluntary rollback" causing a $4,043,000 loss of state financial aid, was an erroneous application of law. Plaintiffs request a determination that tax rate reductions mandated by § 67.110 RSMo do not constitute "voluntary" tax rate reductions causing loss of state aid under § 163.011(13) RSMo.

Introduction to Points III and IV

Points III and IV involve the proper parties to this action. Both the Collector and the School acknowledge that the holding of *Bartlett v Ross*, 891 SW2d 114 (Mo banc 1995), suggests that the School was not a proper party to the refund count of the Amended Petition. Respondents attempt to justify the School's participation as Defendant (Point IV) because of its financial interest in the tax rate.

However, in opposing class action (Point III), Respondents attempt to exclude the class of property taxpayers who have the same financial interest in the tax rate. If the financial interest in the tax rate justifies the School's inclusion, it also justifies the inclusion of all Taxpayers. The School and the Taxpayers have the exact same financial interest at stake.

Respondents have presented conflicting positions concerning the proper parties to this suit. On the one hand, they object to all taxpayers being included because §139.031 RSMo provides for only two parties, a plaintiff taxpayer and a defendant Collector. On the other hand, Respondents assert the School District, which has no greater interest in

the property taxes than the taxpayers who pay them, should be a necessary and indispensable party under that same statute, § 139.031 RSMo.

Either the law should be strictly construed to exclude any party not named, or it should be liberally construed to allow all taxpayers, the school district, or anyone else qualifying as necessary and indispensable to become a party. It should not be "liberally" construed to include the School, and at the same time "strictly" construed to exclude taxpayers.

POINT RELIED ON NO. III

THE TRIAL COURT ERRED IN ITS ORDER DENYING CLASS CERTIFICATION ON THE GROUND THAT "AS A MATTER OF LAW A CLASS ACTION CANNOT BE CERTIFIED IN THIS CASE" BECAUSE THE COMMON LAW DOCTRINE OF VIRTUAL REPRESENTATION, CASE LAW, AND STATUTORY LAW (§ 507.070 RSMO and § 139.031.5 RSMO), AND ARTICLE X, SECTION 3 OF THE MISSOURI CONSTITUTION ALLOW THIS CASE TO PROCEED AS A CLASS ACTION, WITH § 139.031.5 PERMITTING REFUND OF TAXES "MISTAKENLY OR ERRONEOUSLY" PAID PURSUANT TO AN ILLEGAL TAX RATE UPON APPLICATION FILED WITHIN ONE YEAR OF TAX PAYMENT, WITHOUT THE NECESSITY OF INDIVIDUAL TAXPAYER PAYMENTS UNDER PROTEST REQUIRED BY § 139.031.1 RSMO, AND WITHOUT THE NECESSITY OF A SUIT FOR REFUND FILED WITHIN NINETY DAYS THEREAFTER REQUIRED BY § 139.031.2 RSMO.

Argument

The question presented here is: Does Missouri lawallow a class action against a Collector to recover an overcharge of school property taxes due to an unlawfully excessive tax rate? The answer is "yes", drawn from the discussion below of case law, common law, and statutory law.

This is a question of first impression. There is no Missouri case on point. Respondents have directed us to none. The annotations under Sections 139.031 and 67.110 reveal no such case. 10 ALR 4th 655-682 annotates the "Propriety of Class Action in State Courts To Recover Taxes". Section 6, which begins on page 676 of that annotation, specifically applies to the propriety of "Class action to recover property taxes". This annotation reveals that this precise question has never been decided in Missouri.

At the class certification hearing Plaintiffs' made a prima facie case establishing the Rule 52.08 (a) prerequisites to class action. They also presented a number of arguments for class certification which to this date have not been considered. Plaintiffs' case, presented below, is worthy of judicial consideration.

The Trial Court's Order Denying Class Certification stated "as a matter of law a class action cannot be certified in this case…". It appears from this statement the Court accepted Respondents' arguments that the judicial doctrine of sovereign immunity precluded a class action in that no specific legislative enactment authorized class action.

The modified Opinion of the Court of Appeals performed only a cursory review of this issue, commenting on only two of the arguments raised by Plaintiffs, ruling that neither of them were valid.

Doctrine of Virtual Representation

Taxpayers submit that a class action is available here. The common law doctrine of virtual representation recognizes the availability of class actions absent statutory authorization. Missouri statutes can reasonably be interpreted to allow class action here. Other Missouri law suggests class actions are the preferred vehicle for a challenge to a tax rate.

Class actions derive from the equity doctrine of virtual representation, a creation of the equity courts long used in Missouri before the adoption of the present civil code. Class actions are not, and never were, dependent upon statute for their creation and existence. See the article by Earl Crawford in 18 Kansas City Law Review 103 (April, 1950) as quoted in VAMS, Section 507.070, pages 364 to 373. See also *Brown vs. Bibb*, 201 S.W. 2d 370; 356 Mo. 148 (1947).

The doctrine is an exception to the general rule of compulsory joinder of all interested parties. It rests upon considerations of necessity and paramount convenience, and was adopted to prevent failure of justice. See Words and Phrases, pages 498 and 499, regarding "Virtual Representation". See also *State ex rel. Tharel vs. Board of Commissioners of Creek County*, 107 P. 2d 542, 553; 188 Okl. 184; and *Brown v Bibb*, 201 S.W. 2d 370, 356 Mo. 148 (1947).

Even though it's not necessary that state statute provide for class actions, the Missouri state legislature did so in 1943 by adopting § 507.070, RSMo. This law is the controlling statute in Missouri as far as class actions are concerned. It allows them for any purpose. It does not restrict or prohibit their use in any way. There is no exclusion in § 507.070 RSMo precluding their use in cases challenging unlawful tax rates. As there is no such language, rules of statutory construction prohibit the creation of such an exclusion by implication. There is no room for the operation of the judicially created doctrine of sovereign immunity.

The purpose of § 507.070, RSMo was to allow the ease and convenience of a statutory form of the equitable doctrine of virtual representation. The requirements of this law are mandatory and not merely technical or directory. See *Sheets vs. Thomann* (App. 1960) 336 S.W. 2d 701.

Tax rates uniformly apply to taxpayers

Article X, Section 3 of the Missouri Constitution is the people's direction to the state, and all taxing entities, that property tax rates are to be uniformly applied to all taxpayers:

> "Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." *See* A38.

Both Supreme Court Rule 52.08 and § 507.070 RSMo authorize class actions for numerous persons asserting a common interest.

All property owners in the Columbia School District were billed for property taxes at the unlawful tax rate of $4.7544. All of them overpaid their school taxes. Each of them should have an opportunity to obtain refund or credit of the excessive charges. Their interest in this money is the equivalent of the School District's interest in this money.

If only the named Plaintiffs prevail in this case, they will pay a lesser rate than that paid by all other subjects paying taxes to the Columbia 93 School District for 2001. That result would violate Article X, Section 3. If the Court had certified a class of all taxpayers, whether Plaintiffs win or lose, compliance with Article X, Section 3 would have been guaranteed. By refusing to certify a class the Court created the possibility that Article X, Section 3 would be violated.

If Plaintiffs are correct in their interpretation of § 67.110 RSMo, the Court also assured that only nine of the more than 30,000 taxpayers of the School District would be entitled to refund, thus sanctioning a windfall to the School District created by the School District's own unlawful act.

Class Actions are the preferred vehicle for litigation of tax rates

It is the public policy of this state, as set forth in Mo. Const. Art. X, §22(a) (the "Hancock Amendment"), and in §137.073 RSMo, and in §67.110 RSMo, that political subdivisions are not to reap monetary windfalls by exacting excessive property taxes. A mandatory class action is the best vehicle to enforce this public policy.

Fundamental to Missouri taxation is that government officials will follow the law in establishing tax rates. "When the tax gatherer puts his finger on the citizen, he must

also put his finger on the law permitting it." *Tri-State Motor Transit Co. v. Holt*, 921 S.W.2d 652, 657 (Mo.App.S.D. 1996) (citing *Leavell v. Blades*, 141 S.W. 893 (1911)). When the School District set its tax rate, it did so in a manner that was common to the entire class of plaintiffs.

Assuming the School District set an unlawful tax rate, the only way to adhere to the mandates of this state's constitution is to remedy this unlawful act for all taxpayers affected. Allowing the judicially-created doctrine of sovereign immunity to preclude all taxpayers from participating in the refund of an unlawful tax is tantamount to granting School Districts license to benefit from violating the law, from betraying the public trust. Sovereign immunity from an unlawful tax makes absolutely no sense.

In this case, Plaintiffs did all within their legal power to point out the unlawfulness of the tax rate to the School District prior to adoption of the tax rate, to the Collector prior to its being billed, and to the Circuit Court of Boone County prior to its collection. Mr. Lane attempted to enlist the assistance of the Boone County Prosecuting Attorney, the State Auditor, and the Missouri Attorney General. Pltf. Exhs. 24, 25, and 26.

On November 6, 2001, Counsel for Plaintiff Lane notified the Collector that Mr. Lane would be challenging the Columbia 93 School District's 2001 tax rate on behalf of all taxpayers. Pltf. CC Exh. 4. This letter attempted to preserve the right of all taxpayers to be uniformly taxed pursuant to Section 3 of Article X of the Missouri Constitution by protesting the School District's 2001 tax rate on behalf of all taxpayers, and indicating a suit for refund would be filed on behalf of all taxpayers.

Mr. Lane attempted to have the unlawful tax rate enjoined prior to its collection. When this failed, he and 8 other plaintiffs paid their taxes under protest. Pltf CC Exh 1. The written protests of six of the nine named plaintiffs stated the taxpayer was "„ paying my taxes under protest. The Columbia 93 School District has imposed a levy rate….which produces more revenues from local property taxes than called for by the School's budget in violation of Section 67.110 RSMo……I also request that this protest be considered as on the behalf of all other taxpayers subject to the Columbia 93 School District levy authority, so that all such taxpayers pay the same levy rate, as per Boone County Circuit Court Case No. 01CV168043".

The Amended Petition, filed January 14, 2002, immediately sought inclusion of all taxpayers paying the tax in question, as it was the only vehicle left to assure that the law will be uniformly applied to all taxpayers.

Respondents rely on *Charles v Spradling*, 524 S.W. 2d 820 (Mo banc 1975) to argue that Taxpayers can't have a class action.[11] *Charles* is considerably different from

[11] Sovereign immunity has changed considerably since *Charles* was decided in 1975. In 1978, the Missouri legislature adopted Section 537.600, RSMo which transformed sovereign immunity in the state from common law to statutory law effective September 12, 1977. That law, together with Section 537.610, RSMo, significantly changed public policy toward governmental liability for tort damages by waiving a great deal of the immunity that public entities had enjoyed in the past.

this case. The public entity being sued, the statute upon which the suit is based, the type of tax involved, and the depository for the subject tax money, are all different. *Charles* was a suit against the revenue director for the State of Missouri under Section 144.190 RSMo for the refund of state sales taxes that had been improperly collected and deposited in the state treasury.

This case is against a local Collector, not the State. There is no indication the decision was intended to apply to suits against a county collector, school district, or other political subdivisions. State statute specifically allows this refund action against the Collector. The state has consented to this type of suit. The statute Taxpayers proceed under here is different from the statute interpreted in *Charles*.

Finally, another decision by the California Supreme Court, entered eight months earlier, concerning the very same subject matter, allowed a class action. See *Javor v State Board of Equalization*, 527 P. 2d 1153 (Cal. 1974).

As recognized by Chief Justice Seiler in his dissent in *Spradling*, the court-made doctrine that sovereign immunity prohibits a class action in the absence of enabling statute is premised upon the underlying assumption that the taxing entity will follow the law and not take advantage of the taxpayer. *Spradling*, pp 824-826. In instances where the taxing authority is remiss, and the taxpayer comes to the courts as last resort, the credibility of governmental taxation and the credibility of the legal system's ability to provide certain remedy for injury to property is at stake. *Spradling*, supra.

The adoption of the Hancock Amendment in 1980 repealed the underlying assumption of public trust in government taxation. Taxpayers no longer blithely trust

government to manage its own fiscal affairs. This Court has recognized this basic change in public trust in several decisions interpreting the Hancock Amendment. *Fort Zumwalt School Dist. v State*, 896 SW2d 918, 921 (Mo banc 1995); Opinion Justice Robertson in *Beatty v St. Louis Sewer District*, 914 SW2d 791, 798 (Mo banc 1995).

The Missouri Supreme Court has held that class actions on behalf of taxpayers are the preferred vehicles for challenges to tax rates based on Article X, Sections 22 and 23 of the Missouri Constitution. In *Beatty v St. Louis Sewer District*, 914 SW2d 791 (Mo banc 1995) the Supreme Court considered the availability of class actions for a taxpayer suit. Considerations presented were the enforcement of the mandate of Article X, Section 3 of the Constitution requiring all taxpayers to pay the same tax rate, while preventing undue notification expenses associated with opt out class actions. At pages 795-796, footnote 3 of that decision, the Supreme Court suggested that mandatory class actions were *preferred* in actions challenging a property tax rate[12]:

[12] "….Subsection (c)(2), however, by its own terms, applies only to class proceedings certified pursuant to subsection (b)(3) of the rule. Subsection (c)(2), and its various requirements, simply does not apply to class proceedings certified pursuant to subsections (b)(1) or (b)(2), which are probably *preferable* in this type of a lawsuit. Certification under subsection (b)(1) or (b)(2) does not require notification nor does it allow class members to opt out. (citations omitted)

In subsequent decisions the Supreme Court has permitted class actions to enforce Article X, Section 22(a) challenges to the legality of a tax rate in spite of claims that sovereign immunity did not allow class actions. See *Ring v Metropolitan St. Louis Sewer Dist.*, 969 SW2d 716 (Mo banc 1998); and *City of Hazelwood v Peterson*, 48 SW3d 36 (Mo 2001). In *Ring*, at page 719, the Court stated:

"As we suggested in Beatty III, plaintiffs are not precluded from bringing a Rule 52.08 class action if such action is appropriate under the specific facts of the case."

It makes little sense that a class action can be used to challenge the lawfulness of a School District's tax rate under the Hancock Amendment, but cannot be used to challenge the lawfulness of the same tax rate under § 67.110 RSMo. This conclusion is further supported by the fact that the legislature has enacted another statute, § 137.073 RSMo, that specifically provides for class actions to challenge a tax rate.

§ 137.073.8 and .9 RSMo provide for class actions challenging tax rates. Like § 139.031.5 RSMo, the class action authorized in § 137.073.9 is indeed for taxes "erroneously" paid pursuant to an unlawful or improper tax rate. § 137.073.9 RSMo provides that "[i]f in any action, including a class action, the court issues an order requiring a taxing authority to revise the tax rates as provided in this section ..., any taxpayer paying his or her taxes when an improper rate is applied has erroneously paid his or her taxes in part, whether or not the taxes are paid under protest as provided in § 139.031, RSMo."

The existence of this statute does not comport with Respondents' claims that the legislature has not authorized class actions to challenge tax rates. The doctrine of

sovereign immunity should not be viewed as prohibiting a class action to challenge an unlawful tax rate. It is the public policy of this state that political subdivisions are not to reap a monetary windfall from an unlawfully excessive tax rate, and class action is the remedy available to all taxpayers in which to challenge an unlawful tax rate.

Subsection 5 of § 139.031 RSMo, should be read to allow a class action.

This subsection provides:

> "All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector, or shall credit against the taxpayer's tax liability in the following taxable year any real or personal property tax mistakenly or erroneously levied against the taxpayer and collected in whole or in part by the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid….."[13]

A43 (emphasis added).

Subsection 5 establishes a very different procedure than does Subsection 1 of § 139.031 RSMo. *See* A43. In obtaining refund of taxes mistakenly or erroneously paid, there is no requirement of *individual* taxpayer payments of taxes under protest. Instead,

[13] In 2003 this statute was amended to allow taxpayers three years after mistakenly or erroneously levied taxes are paid in which to apply for refund. Contrary to the School's assertions, it is the legislature, not the Court of Appeals opinion in this case, that subjects unlawful taxes to the possibility they will later be refunded.

subsection 5 specifically allows refund or credit upon application filed within one year after the tax was mistakenly or erroneously paid.[14]

The difference is significant, and must be given meaning. Respondents' position would require the imposition of §139.031.1 and .2 RSMo upon actions to recover taxes mistakenly or erroneously paid pursuant to an unlawful tax rate, something § 139.031.5 RSMo does not require. As stated by the Missouri Supreme Court in *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874 (Mo.banc 1983), "[i]n construing statutes, the Court's primary responsibility is to ascertain intent of General Assembly from language used and to give effect to that intent. [cite omitted] Furthermore, all provisions of a statute must be harmonized and every word, clause, sentence and section must be given some meaning." *Id*. at 881.

"Mistaken or Erroneous Payment" includes the payment of an unlawful tax rate

Subsection 5 of 139.031 RSMo applies to taxes "mistakenly or erroneously paid". Plaintiffs believe that this language was intended to include payment of an unlawful tax

[14] Respondents' claims that remedy of subsection 5 of 139.031 requires compliance with subsections 1 and 2 of that same statute are wrong. Subsection 5 establishes its refund remedy for taxes mistakenly or erroneously paid without the requirement of protest at the time of payment, and without the requirement of suit imposition within 90 days of payment. If subsection 5 required simultaneous payment and protest, and required a refund suit imposed within 90 days, there would have been no need for the old one year time limit for applying for refund, or for the new three year limit.

rate. As stated earlier, § 137.073.9 RSMo equates taxes paid pursuant to an unlawful tax rate to having been "erroneously" paid, and class action is authorized.

In the sales tax arena, the Supreme Court of Missouri has also equated taxes paid pursuant to an improper or illegal tax as one levied without statutory authority, thus refund is permitted by the legislature's use of the statutory words "overpayment" or "erroneous" in describing taxes paid. *Community Federal Savings and Loan v Director of Revenue*, 752 SW2d 794, 797-798 (Mo banc 1988):

> "Section 136.035 is subject to the ordinary rules of statutory construction and interpretation. The word "overpayment" in section 144.190 has been interpreted by this Court in *Kleban*, 247 S.W.2d at 839, to include taxes illegally collected. Although the refund for overpayments in section 144.190 refers to sales and use tax, the statute is an aid in interpreting what the legislature intended for the terms "overpayment" and "erroneous." An erroneous or illegal tax is one levied without statutory authority. [citations omitted] …….A reasonable construction of the terms "overpayment" and "erroneous" as used in section 136.035 includes the term "illegal" as seen from other interpretations by this Court, the plain meaning of the language and the definition in Black's Law Dictionary.

Community Federal thus interpreted the words "overpayment" or "erroneous payment" of § 136.035 RSMo to allow a suit for refund to proceed on behalf of taxpayers that had paid an illegal tax, even when the Defendant contended this was precluded by the doctrine of sovereign immunity.

Applying this same logic and reasoning to § 139.031.5 RSMo, § 139.031.5 RSMo does provide for refund of payments of unlawful taxes "mistakenly or erroneously paid in whole or in part" without the necessity of individual taxpayer protests and refund suits. As subsection 5 of § 139.031 RSMo is not predicated upon individual protests and refund suits, it permits class actions in order to assure that taxes are uniformly applied as required by Section 3 of Article X of the Constitution of Missouri.

All that subsection 5 of § 139.031 RSMo requires is an application made within one year of payment. *See* A43. The November 6, 2001 letter to the Collector from Mr. Lane's Counsel qualified as such an application. Pltf CC Exh.4. The named Plaintiffs' protest qualified as such an application. The Amended petition of this lawsuit, filed against the Collector on January 14, 2002, on behalf of all taxpayers, qualified as such an application. Plaintiffs could not have done more to preserve the rights of all taxpayers.

Relief Requested

Plaintiffs request that the Trial Court's decision denying class certification b e reversed. Plaintiffs also request the case be remanded to the Trial Court with direction to certify this case as a mandatory class action, to enter judgment in favor of the class, and to conduct further proceedings under Rule 52.08 to consider the award of costs and attorneys fees.

POINT RELIED ON NO. IV

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT COLLECTOR'S MOTION TO JOIN THE COLUMBIA 93 SCHOOL DISTRICT AS A NECESSARY AND INDISPENSABLE PARTY DEFENDANT TO A TAX REFUND ACTION BROUGHT PURSUANT TO § 139.031 RSMO, BECAUSE UNDER THIS STATUTE THE COLLECTOR IS THE ONLY PROPER PARTY DEFENDANT, IN THAT THERE ARE PROPERLY ONLY TWO PARTIES TO A CIRCUIT COURT PROCEEDING BASED ON THIS STATUTE – THE "TAXPAYER" AND THE "COLLECTOR".

Standard of Review

In Missouri, the Courts of Appeal review a trial court's joinder of a party pursuant to Rule 54.02 under an abuse of discretion standard. *Feinstein v. Feinstein*, 778 S.W.2d 253, 257 (Mo.App. E.D. 1989).

"In reviewing an alleged abuse of discretion, we review the trial court's ruling to determine whether it was supported by substantial evidence, was against the weight of the evidence, or was the result of a misapplication of the law. *Boatmen's First Nat'l Bank v. Krider*, 844 S.W.2d 10, 11 (Mo.App.W.D.1992)." *Fuller v. Ross* 68 S.W.3d 497, 500 (Mo.App.W.D. 2001) (Motion for Rehearing and/or Transfer to Supreme Court Denied Jan. 29, 2002; Application for Transfer Denied March 19, 2002).

Argument

Plaintiffs' Amended Petition sets forth a tax refund claim pursuant to the remedy found in § 139.031 RSMo. Count I sought declaratory judgment that the 2001 tax rate was unlawful. Count II sought refund of the amount of the unlawful tax collected pursuant to § 139.031 RSMo. (L.F. 45-52). The Opinion of the Court of Appeals failed to address this Point IV, holding it was moot.

The statute contemplates the taxpayers and the collector as being the sole parties to a § 139.031 RSMo refund action. The statute does not contemplate the taxing authorities as being parties. Precedent establishes that schools lack standing to be parties to § 139.031 RSMo actions. This precedent recognizes that requests to include schools as necessary or indispensable parties should be denied by application of law.

§ 139.031 RSMo sets forth procedures for paying taxes under protest, commencing actions to recover tax payments, refunds of taxes, interest, and disbursal of taxes to taxing authorities. See A43. Subsections 1, 2, 3, 4 and 5 of § 139.031 RSMo set forth procedures for taxpayers to utilize, including the procedures to be followed in Circuit Court.

Subsection 3 provides:

> "No action against the collector shall be commenced by any taxpayer……"

Subsection 5 provides:

> "All county collectors of taxes, ... shall, upon written application of a taxpayer..."

Subsection 4 provides:

"…after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest, together with any interest earned thereon, or to authorize the collector to release and disburse all or any part of the impounded taxes, and any interest earned thereon, to the appropriate officials of the taxing authorities. Either party to the proceedings may appeal the determination of the circuit court."

A43 (emphasis added in all subsections)

In *Bartlett v Ross*, 891 SW2d 114, 116-117 (Mo banc 1995), the Missouri Supreme Court held that a School District that had been permitted to intervene in circuit court could not appeal the result. The School asserted standing based on its status as an entity on whose behalf the taxes were collected. As is the case here, *Bartlett v Ross* involved a taxpayer challenge to the tax rate only, not as to any other tax questions. The Supreme Court relied upon the following statutory analysis in concluding that the only two parties to the circuit court proceeding are the "taxpayer" and the "collector":

"The two parties to the circuit court suit are the "taxpayer" and the "collector":

(E)very *taxpayer* protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the *collector* by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. § 139.031.2 (emphasis added)[sic].

Continuing, the statute does not permit *any* party to appeal from the circuit court. It states: "*Either* party to the proceedings may appeal the determination of the circuit court." *§ 139.031.4* (emphasis added) [sic]. The statute thus allows appeal by *either* the taxpayer *or* the collector. 'The right to seek judicial review depends upon its express authorization by either a statute or rule.' [citations omitted]. In this case, no such express authorization exists for school districts. Consequently, the District may not appeal the order of the circuit court.

This holding accords with this Court's precedent on earlier administrative process…. School Districts likewise do not have the right to intervene before the State Tax Commission—and thus no standing to appeal—because the legislature has determined that 'the school board's interests are adequately represented by the county assessor, who is the party respondent.' [citations omitted]

This logic applies equally to the present case. Just as school districts may not appeal administrative decisions, they may not appeal refund judgments, absent a statute. By the plain language of 139.031.4, only the protesting taxpayers and the Jackson County collector may appeal the January 27, 1994 order of the circuit court."

Bartlett, p. 116-117. The decision makes it clear that the Circuit Court in *Bartlett* initially erred in permitting the school district to intervene.

The Boone County Circuit Court committed the same error here, even though Plaintiffs pointed out the *Bartlett* authority to the Circuit Court prior to its decision, attaching it to their Opposition. (L.F. 71-80)

School Districts have routinely been denied intervention in § 139.031 RSMo tax refund cases. Intervention has been refused under Rule 52.12, the very Rule for which Defendants here suggested intervention was proper. In *State ex rel Brentwood School District v State Tax Commission*, 589 SW2d 613 (Mo 1979), the Supreme Court determined Schools lack the right to intervene in tax assessment cases before the State Tax Commission. In finding a lack of interest justifying intervention, the *Brentwood* Court relied upon the statutory scheme making tax disputes between the taxpayer and the County, not the individual taxing authorities:

> "If the General Assembly had intended to grant school districts the right to intervene in tax assessment appeals, it would have so provided. No doubt the General Assembly did not so provide because the school board's interests are adequately represented by the county assessor, who is the party respondent under § 138.470.1 RSMo 1978. Moreover, it follows that because a school district does not have sufficient standing to appeal a tax assessment, under St. Francois County School District R-III, it does not have sufficient interests, not otherwise adequately represented, to intervene as of right." *Brentwood* at 614.

In *Alexian Brothers Sherbrooke Village v St. Louis County*, 884 SW2d 727 (Mo App E.D. 1994), a School District attempted to intervene in a taxpayer lawsuit to determine the applicability of a tax exemption. The Court of Appeals rejected the notion the School was entitled to intervene. The basis for this rejection was the same logic and references to the statutory taxation scheme recognized by the Courts in *Bartlett* and *Brentwood*.

A ruling that School Districts lack a statutorily protectible interest justifying party status is consistent with other decisions holding that taxpayers lack standing in certain statutory tax proceedings. School District party participation in § 139.031 RSMo proceedings is limited to lawsuits for disbursement or return of protested taxes. When School Districts seek disbursement of protested tax funds prior to resolution of the protest, taxpayers lack the statutory interest necessary to intervene in the disbursement action. *Maplewood-Richmond Heights School District v. Leachman*, 735 S.W.2d 32 (Mo.App. E.D. 1987). In *Maplewood*, the Court recognized that the statutory provisions of § 139.031.8 RSMo made only the School District and the Collector party to disbursement or refund of disbursement proceedings. Applying the same logic here, School Districts are not entitled intervention in the taxpayer lawsuit for refund of protested taxes.

As can be seen the statutes contemplate that only taxpayers and collectors are to be parties to issues concerning the propriety of the amount of taxes paid. School Districts lack standing to participate. Conversely, in actions considering the disbursements of funds from the Collector to taxing entities, taxpayers are not to be parties. The trial court's order allowing Defendant Columbia 93 School District to be a party defendant to this action involving the propriety of the amount of taxes paid was in violation of § 139.031 RSMo.

Relief Requested

Plaintiffs request a reversal of the Trial Court's determination the Columbia 93 School District was a proper party defendant, with remand direction to the Trial Court to dismiss the School District as a party to this action.

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By_____
Craig S. Johnson MO Bar No. 28179
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
Email: CJohnson@AEMPB.com

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE AND OF SERVICE

The undersigned does hereby certify that the foregoing Appellants' Brief conforms with Supreme Court Rules 84.04 and 84.06, consisting of 1,569 lines of text and 15,736 words, that the accompanying disk has been scanned for viruses and it is virus-free, and that a true and accurate copy of the foregoing brief and a copy of the accompanying disk which have all been scanned for viruses and are hereby certified as virus-free, was mailed, via U.S. Mail, postage prepaid, this _____ day of _____, 2004, to all attorneys of record in this proceeding.

Alex Bartlett
Attorney at Law
235 East High Street
P.O. Box 1251
Jefferson City, MO 65102

John L. Patton
Attorney at Law
Boone County Counselor
601 East Walnut, Room 207
Columbia, MO 65201

Melissa Randol
Susan Goldammer
Missouri School Board's Association
2100 I-70 Drive SW
Columbia, MO 65203

_____
Craig S. Johnson Mo. Bar No. 28179